Information Commissioner's Office

Consultation:

Direct Marketing Code

Start date: 8 January 2020

End date: 4 March 2020

Introduction

The Information Commissioner is producing a direct marketing code of practice, as required by the Data Protection Act 2018. A draft of the code is now out for public consultation.

The draft code of practice aims to provide practical guidance and promote good practice in regard to processing for direct marketing purposes in compliance with data protection and e-privacy rules. The draft code takes a life-cycle approach to direct marketing. It starts with a section looking at the definition of direct marketing to help you decide if the code applies to you, before moving on to cover areas such as planning your marketing, collecting data, delivering your marketing messages and individuals rights.

The public consultation on the draft code will remain open until **4 March 2020**.The Information Commissioner welcomes feedback on the specific questions set out below.

You can email your response to directmarketingcode@ico.org.uk

Or print and post to:

Direct Marketing Code Consultation Team
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF

If you would like further information on the consultation, please email the Direct Marketing Code team.

Privacy statement

For this consultation we will publish all responses received from organisations except for those where the response indicates that they are an individual acting in a private capacity (eg a member of the public). All responses from organisations and individuals acting in a professional capacity (eg sole traders, academics etc) will be published but any personal data will be removed before publication (including email addresses and telephone numbers).

For more information about what we do with personal data please see our privacy notice

Q1 Is the draft code clear and easy to understand?

☐ Yes

☒ No

If no please explain why and how we could improve this:

See the table at Q7.

Q2 Does the draft code contain the right level of detail? (When answering please remember that the code does not seek to duplicate all our existing data protection and e-privacy guidance)

☐ Yes

☒ No

If no please explain what changes or improvements you would like to see?

See the table at Q7.

Q3 Does the draft code cover the right issues about direct marketing?

☒ Yes

☐ No

If no please outline what additional areas you would like to see covered:

See the table at Q7.

Q4 Does the draft code address the areas of data protection and e-privacy that are having an impact on your organisation's direct marketing practices?

☒ Yes

☐ No

If no please outline what additional areas you would like to see covered

See the table at Q7.

Q5 Is it easy to find information in the draft code?

☒ Yes

☐ No

If no, please provide your suggestions on how the structure could be improved:

See the table at Q7.

Q6 Do you have any examples of direct marketing in practice, good or bad, that you think it would be useful to include in the code

☒ Yes

☐ No

If yes, please provide your direct marketing examples :

See the table at Q7.

Q7 Do you have any other suggestions for the direct marketing code?

Yes, please see the table below.

We welcome the guidance and are keen to act in accordance with data subjects' rights, for example providing them with transparency and protecting vulnerable groups. However, we have highlighted a number of areas where there is a lack of clarity.

Section	**Response**
Interests of data subjects and others (Page 10)	This section deals with two key points – the view that the ICO has taken regarding "the interests of data subjects and others" and the impact of direct marketing, both of which appear unduly negative. Pursuant to section 122(5) of the DPA 2018, the ICO has a statutory obligation to have *"regard to the interests of data subjects and others".* In the draft code the ICO has made many assumptions about the interests of data subjects by its repeated use of words such as "*unlikely*" and "*likely*" in reference to what the data subjects might know or expect. Overall it appears that the ICO's working assumption is that data subjects are vulnerable and not aware of data processing and how it is used for direct marketing. Perhaps the ICO's view of the interests of data subjects as regards direct marketing is based on the complaints that it receives. However, we respectfully submit that the complaints on their own, almost certainly, do not represent the views of the many millions of data subjects who have gone on to interact with and indeed purchase from the majority of successful brands. The vast majority of direct marketing is relatively benign and, in our experience, does not upset the vast majority of data subjects. Adopting the draft guidance in its current form, notwithstanding the ICO's comments on page 35, will have a negative impact on the *"interests of data subjects"* and a serious detrimental impact on the interests of *"others"* including data suppliers, list brokers and brands - almost certainly leading to loss of thousands of jobs and revenue probably in the hundreds of millions of pounds. It would be useful for the sake of transparency for the ICO to set out which interests of the data subjects and others it has considered and why. Also, it would help all parties concerned if the ICO could provide guidance at the end of each relevant example in the draft code to clarify how a breach of GDPR or PECR can easily be avoided.

Section	Response
Service messages v's direct marketing messages (page 23)	It is regrettable that the ICO considers the Scenario B message to constitute a direct marketing communication whereas it could have easily concluded that it was a service message. For example, in the current climate of the coronavirus, health professionals should not be concerned about direct marketing regulations as there is clearly an overriding public interest at stake. It is legally and morally wrong for the ICO to claim that the GP has breached the GDPR and therefore could be fined.
Consent v's Legitimate Interest (Page 31)	The guidance has moved away from previous guidance suggesting that all six legal bases for processing data have equal weight and the most appropriate one should be selected, to a position where only consent is acceptable. This is confusing in light of previous ICO information, in particular Elizabeth Denham's blog – 'Consent is not the silver bullet for GDPR compliance' – August 2017. Currently, for example, many brands and most data suppliers/list brokers rely on legitimate interest which requires them to list the categories of recipients when complying with Art.13 or Art.14. Were we to rely solely on consent, based on what the ICO has previously said, data controllers would need to name all of the recipients (i.e. clients) when providing Art.13 or Art.14 information. The data suppliers/list brokers do not always know the identity of the recipients (usually their future client) at the time when they receive/collect the data. Accordingly, recommending that they get consent cannot be good practice. Furthermore, with reference to section 122(5) of the DPA 2018 it is not in the interest of data subjects to receive large numbers of transparency communications (the Art.13 or Art.14 information) from numerous organisations involved in the background and foreground direct marketing activities. The good practice recommendation should say that consent should be obtained where appropriate and practicable, otherwise an organisation can consider relying on legitimate interest. Also, it would be useful for the ICO to recommend that the brands sending direct marketing communications should update their privacy notices to explain clearly how personal data from data suppliers may be used and what sort of information may be added to individual customer records. Another helpful approach would be to provide some templates or better guidance for conducting a more robust Legitimate Interest Assessment.

Section	Response
The application of the balancing test (Page 36)	The sentence, *"Other examples of when it is very difficult for you to pass the balancing test include:"* should start with "Subject to Art.13 or Art.14….". Clearly informing the data subjects within your privacy statement, under Art.13 or Art.14, that you are collecting *"vast amounts of data from various different sources to create personality profiles on individuals to use for direct marketing purposes"*, enables the data subject to exercise his/her rights under GDPR including the right to object. Accordingly, contrary to the new guidance, subject to compliance with Art.13 or Art.14 we would suggest that it is therefore not difficult to pass the balancing test. Also, the statutory exemption in Art 14(5) should be available to organisations to use as GDPR clearly anticipates.
6-month retention of consent (Page 42)	The draft code introduces a recommendation "*When sending direct marketing to new customers on the basis of consent collected by a third party, we recommend that you do not rely on consent that was given more than six months ago.*" What is the basis of the 6 month good practice recommendation? The good practice recommendation should be amended as it is relatively easy to envisage circumstances that an organisation will want to rely on consent that is much older than 6 months. It should not be automatically invalid. The ICO should not give a prescribed time period but recommend consideration of certain factors when deciding how long the data should be kept for, such as the corresponding typical product replacement life cycle periods (for example, currently most mobile phones are replaced every two years and no data subject should be surprised to receive direct marketing for up to two years afterwards). The ICO should also note the interests of the data subject are not being unfairly prejudiced or harmed by retention of their data for longer than six months given the ease with which a data subject can object or withdraw its consent.
What do we need to tell people if we collect data from other sources (Page 48)	The ICO states that "*you must provide privacy information to individuals within a reasonable period and at the latest within a month of obtaining their data*" The ICO should note that it has made an error in this statement as it is clear form article 14 (3) that there are three limbs, (a), (b), **OR,** (c). The ICO appears to only have commented on the first limb (a) and should make it clear that limbs (b) or (c) are also available.

Section	Response
Disproportionate effort (Page 49)	Article 14(5) does not mention the reasonable expectations of a customer which is a central component of legitimate interest. The ICO appears to be linking the exemption in Art.14(5) to the balancing test for legitimate interest. The ICO has reached an erroneous conclusion in doing so. The reasonable expectation of the data subjects is not referenced in Art.14(5) and therefore it should be possible for the exemption to apply, simply, if the conditions set out in Art. 14(5) are met. Accordingly, there should be no automatic bar preventing organisations from using the clear statutory right in Art.14(5), even in circumstances where extensive profiles are being built on individuals using large volumes of data. The most obvious application of the disproportionate effort exemption is when large volumes of data are involved and if *"the provision of information proves impossible or would involve disproportionate effort…".* The ICO's view about the application of disproportionate effort renders the exemption largely null and void. Additionally, the ICO is silent on the circumstances in which the exemption applies so perhaps it can provide some clear guidance on this.
Data subjects receiving repeat Article 13 or 14 information notices (Page 57)	The guidance appears to suggest that organisations are expected to send a communication to the data subject every time something new is added to their list or database or processed by a new data processor. This cannot be in the data subject's interest. They would be inundated and confused by Art.14 information notices.
Intrusive profiling (Page 57)	The ICO states: *"It is unlikely that you will be able to apply legitimate interests for intrusive profiling for direct marketing purposes. This type of profiling is not generally in an individual's reasonable expectations and is rarely transparent enough."* The ICO appears to introduce a new category of profiling, *"intrusive profiling"*. GDPR anticipates that, inter alia, consent or legitimate interest lawful basis can be used for profiling subject to the special rules in Art.22 of GDPR. Neither Art.22 nor the Recitals in the GDPR refer to *"intrusive profiling"* accordingly any organisation should be able to rely on legitimate interest or consent as its lawful basis for profiling unless such profiling *"produces legal effects on the data subject or similarly significantly affects him or her"*. Intrusive profiling is a more confusing term than the existing language that refers to profiling in GDPR. We submit that if the legislators had intended for profiling for direct marketing purposes to only be lawful using consent then, they would have provided for it, for example, by way of a proviso, similar to the proviso at the end of Art.6 (which provides that legitimate interest shall not apply to processing by public bodies).

Section	Response
The implications of using third parties to send our direct marketing (Page 82/83)	This section conflates two separate activities. A data controller communicating on behalf of a brand is different to a brand using a data processor to undertake communications. The ICO should be more explicit about the nature of the relationship between the two parties in terms of controller processor / joint controller. Our interpretation of how PECR 22(2) works is not aligned with the guidance. If an organisation (i.e. controller) decides to send a direct marketing communication to its individual customers, and asks a third party (i.e. processor) to send an email campaign on its behalf for which the controller has valid consent under PECR 22, the said processor, clearly, does not also need to get consent from the controller's customers. In this example, clearly, the sender and the instigator are the same party, i.e. the controller; even though the processor, mechanically, sends the emails as instructed by the controller to the controller's individual customers. In the event that the ICO still believes that the sender and instigator are different entities for the purposes of PECR in the above example, then it would be trivial for the controller to press the "send button" instead of the processor. Presumably the ICO would not then conclude that the sender and instigator are the same entity. With reference to the following paragraph on page 83: *"Both you and the third party are responsible for complying with PECR. For example if Company A is encouraged by Company B to send its marketing emails then both companies require consent from the individual under PECR– Company A because they are the sender and Company B because they are the instigator"*, for the reasons given above, it is simply not true, that Company A, which might be a mere processor acting on behalf of Company B, also requires consent under PECR. Furthermore, the ICO's interpretation of regulation 22(2) has a knock-on effect which renders the soft-opt in PECR 22(3) unworkable, because only one of the entities involved could rely (i.e. the controller) on the soft-opt in. It makes no sense for the processor, also to seek consent and upon receiving it, be able to use the soft-opt in.
Selecting the appropriate lawful basis (Page 102)	We believe it would be helpful for the ICO to make it clear to controllers that they can safely process data subjects' personal data under the lawful basis of legitimate interest. Under PECR, consent is required for email communications. However, this guidance suggests that all other direct marketing purposes associated with that email activity should also be processed under the lawful basis of consent, when in fact it is only the transmission of the final email that requires consent. To that end we, and our clients, should confidently be able to process data for the purposes of, for example, profiling, analytics and modelling under legitimate interest. I.e. PECR sits alongside GDPR in this context, it does not override it.

About you

Q8 Are you answering as:

- ☐ An individual acting in a private capacity (e.g. someone providing their views as a member of the public)
- ☐ An individual acting in a professional capacity
- ☒ On behalf of an organisation
- ☐ Other

Please specify the name of your organisation:

CACI Limited

If other please specify:

N/A

Q9 How did you find out about this survey?

- ☐ ICO Twitter account
- ☐ ICO Facebook account
- ☐ ICO LinkedIn account
- ☐ ICO website
- ☒ ICO newsletter
- ☐ ICO staff member
- ☐ Colleague
- ☐ Personal/work Twitter account
- ☐ Personal/work Facebook account
- ☐ Personal/work LinkedIn account
- ☐ Other

If other please specify:

Thank you for taking the time to complete the survey